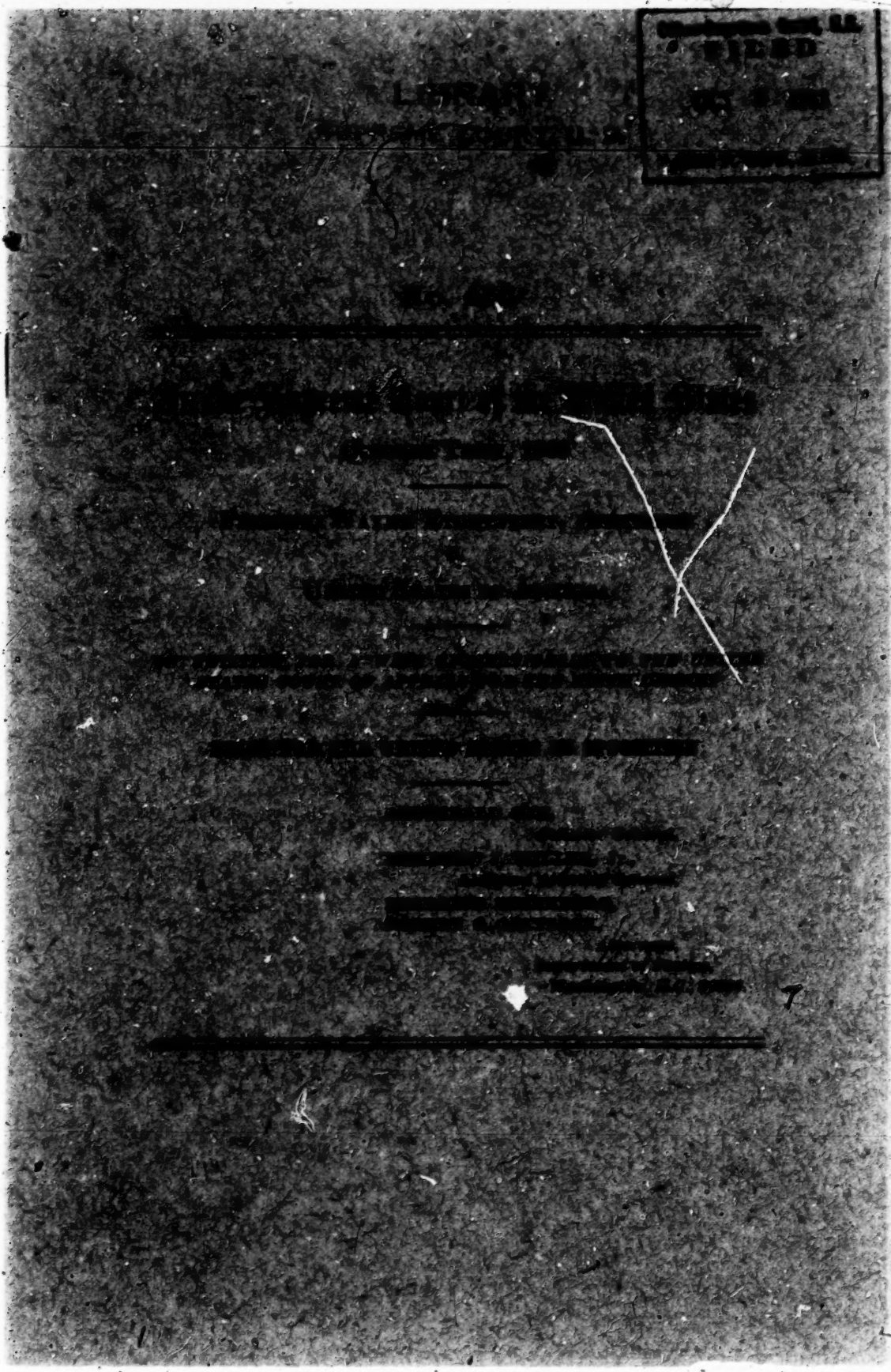

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 456

FREDERIC WAYNE ETCHEVERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. I, 17–18;[1] Pet. App. 1–2) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1963 (Vol. I, 19; Pet. App. 3). On July 31, 1963, Mr. Justice White ordered the time for filing a petition for a writ of certiorari extended to and including September 9, 1963 (Pet. App. 4), on which date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The record is in two volumes, to which we shall refer by their Roman numerals.

QUESTIONS PRESENTED

1. Whether peacetime conscription for service in the armed forces violates the Fifth and Thirteenth Amendments to the United States Constitution.

2. Whether the exemption for religious ministers in Section 6(g) of the Universal Military Training and Service Act violates the First Amendment.

3. Whether the definition of a conscientious objector in Section 6(j) of the Act violates the First Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8 of the Constitution of the United States provides in part:

> The Congress shall have Power * * *
>
> * * * * *
>
> To declare War * * *
>
> To raise and support Armies * * *
>
> To provide and maintain a Navy * * *
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 6 of the Universal Military Training and Service Act, 62 Stat. 611, 612, 50 U.S.C. App. 456, provides in part:

* * * * *

> (g) Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled, shall be exempt from training and service (but not from registration) under this title.
>
> * * * * *
>
> (j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. * * *

Section 12 of the Act, 62 Stat. 622, 50 U.S.C. App. 462, provides in part:

> (a) Any member of the Selective Service System or any other person charged as herein

provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * * or who otherwise evades or refuses * * * service in the armed forces or any of the requirements of this title, * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Section 16 of the Act, 62 Stat. 624, 50 U.S.C. App. 466, provides in part:

* * * * *

(g) (1) The term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

(2) The term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.

* * * * *

STATEMENT

Having waived a jury, petitioner was convicted in the United States District Court for the Southern District of California of refusing to obey an order for induction into the armed forces in violation of Section 12(a) of the Universal Military Training and Service Act (Vol. I, 2–3, 10). He was sentenced to imprisonment for three years (Vol. I, 10).

Pertinent facts from petitioner's Selective Service file, which was introduced into evidence as Government Exhibit 1,[2] are as follows:

On July 8, 1957 petitioner registered at Local Board No. 95, Los Angeles, California (Gov. Ex. 1, p. 13). He was classified 1–A on August 13, 1959, and on the following day the Local Board mailed him a notice of this classification (Gov. Ex. 1, p. 14). On March 28, 1962, petitioner asked for a form whereby to change his registration "from 1–A to CO," and Selective Service Form 150, for conscientious objectors, was given to him (Gov. Ex. 1, p. 24).

Petitioner responded affirmatively to the question on the form as to whether he believed in a Supreme Being. He then explained, "I believe in an anthropomorphic being who makes contact with all individuals by a vine like spiritual field which trys [*sic.*] to take root. To kill another human is to cut off part of God" (Gov. Ex. 1, p. 25). He refused to answer questions pertaining to his external manifestations of belief or to his organizational affiliations, stating that some questions were "extremely offensive." (Gov. Ex. 1, pp. 26, 27). He also wrote at the end of the form: "The signing of the form does not mean I will serve in any other capacity for the government. I know about the fine and prison." (Gov. Ex. 1, p. 28). The form was filed on April 11, 1962.

On May 8, 1962, petitioner was again classified 1–A and was notified of his classification (Gov. Ex. 1, p. 14). Two days later he placed a long distance

[2] We are filing Government Exhibit 1 with the Clerk of this Court. Page references are to the pencil numbers in the middle of the page.

telephone call to the Local Board and asked why his classification had not been changed. An assistant clerk informed him of his right to appeal. Petitioner then stated that he would not appeal because he did not "have time for any more 'silliness.'" He asked that a note be placed in his file stating that he would not appear in response to an order, and that the Board could "throw him in the 'klink'" if it wanted to (Gov. Ex. 1, p. 41).

On May 23, 1962, petitioner was mailed an order to report for induction on June 29, 1962 (Gov. Ex. 1, p. 42). He failed to report for induction as ordered (Gov. Ex. 1, p. 52). In a letter to the Local Board which was received on July 9, 1962, petitioner stated: "I did not report for induction because I want to go to court" (Gov. Ex. 1, p. 54).

ARGUMENT

Petitioner did not contend in the court of appeals, nor does he maintain here, that the Local Board was mistaken in rejecting his claim that he was a conscientious objector. Any such contention would obviously be inappropriate since petitioner failed to exhaust the appellate remedies available to him within the Selective Service System and refused to report for induction. See 32 C.F.R. § 1626.25. *Falbo* v. *United States*, 320 U.S. 549; *Estep* v. *United States*, 327 U.S. 114, 123. Petitioner's arguments concern only the constitutionality of peacetime conscription, of exemptions to religious ministers, and of the statutory definition of conscientious objectors. All of these contentions have consistently

been rejected by federal courts, and none requires re-examination by this Court at the present time.

1. Peacetime conscription is authorized under both the war power (Clause 11 of Article I, Section 8 of the Constitution) and the power of Congress "to raise and support armies" (Clause 12). This Court has recognized that the war power includes "reasonable preparation for the storm of war." *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 476. No provision of the Constitution either expressly or impliedly limits the Congress' power to raise armies to periods of actual warfare. *See United States* v. *Herling*, 120 F. 2d 236 (C.A. 2); *United States* v. *City of Chester*, 144 F. 2d 415 (C.A. 3); *Bertelsen* v. *Cooney*, 213 F. 2d 275, 277 (C.A. 5), certiorari denied, 348 U.S. 856; *United States* v. *Henderson*, 180 F. 2d 711, 713 (C.A. 7), certiorari denied, 339 U.S. 963; *Richter* v. *United States*, 181 F. 2d 591, 593 (C.A. 9), certiorari denied, 340 U.S. 892; *Warren* v. *United States*, 177 F. 2d 596, 599 (C.A. 10), certiorari denied, 338 U.S. 947; *United States* v. *Garst*, 39 F. Supp. 367 (E.D. Pa.).

Nor does compulsory service in the armed forces violate the due process clause of the Fifth Amendment. The individual citizen may be incidentally or temporarily restrained of his liberties in order to protect the liberties of the people as a whole. *Jacobson* v. *United States*, 197 U.S. 11, 29. And since the purpose of the Act is to maintain national defense and military preparedness, conscientious objectors may be assigned to work designed to protect the public health and welfare. Such compulsory service

by those who claim to be morally unable to engage in martial activity is reasonably related to the purpose of the Act. *United States* v. *Hoepker*, 223 F. 2d 921, 923 (C.A. 7), certiorari denied, 350 U.S. 841; *United States* v. *Niles*, 122 F. Supp. 382, 384 (N.D. Cal.), affirmed, 220 F. 2d 278 (C.A. 9), certiorari denied, 349 U.S. 939; *Bertelsen* v. *Cooney*, 213 F. 2d 275, 277 (C.A. 5), certiorari denied, 348 U.S. 856.

The Act obviously does not violate the Thirteenth Amendment, which was intended to abolish only the well-known forms of slavery and involuntary servitude, and not to affect the government's power to compel a citizen to render public service. Cf. *Butler* v. *Perry*, 240 U.S. 328, 332–333. This Court in *Arver* v. *United States*, 245 U.S. 366, 390, said that the argument under the Thirteenth Amendment was "refuted by its mere statement."

2. Petitioner's claim that the statutory exemption for religious ministers violates the First Amendment was rejected without discussion by this Court in *Arver* v. *United States*, 245 U.S. 366, 390, because "its unsoundness is too apparent to require * * * more." The validity of the exemption was also impliedly sustained in *Dickinson* v. *United States*, 346 U.S. 389. See also *United States* v. *Henderson*, *supra*; *George* v. *United States*, 196 F. 2d 445, 452 (C.A. 9), certiorari denied, 344 U.S. 843; *United States* v. *Mohammed*, 288 F. 2d 236, 244 (C.A. 7), certiorari denied, 368 U.S. 820; *Richter* v. *United States*, *supra*, 184 F. 2d at 593; *Warren* v. *United States*, *supra*, 177 F. 2d at 599.

3. Petitioner's final contention is that the statutory definition of a conscientious objector violates the First Amendment insofar as it requires "belief in a relation to a Supreme Being." Since petitioner did, in fact, indicate on his Selective Service Form that he believed in a Supreme Being, and since petitioner's failure to appeal from the Local Board's adverse ruling prevented the record from showing on what basis the Board acted, it is doubtful whether petitioner now has standing to assert this claim. *George* v. *United States, supra.*

Assuming, however, that the contention is properly asserted, it is clearly without merit. The statute does not establish any particular religion, nor does it interfere with petitioner's right to adopt any religion of his choice. Cf. *United States* v. *Mohammed*, 288 F. 2d 236, 244 (C.A. 7), certiorari denied, 368 U.S. 820. The fact that the special treatment which the Act provides is limited, so that it might be effectively administered, to those whose moral convictions are based upon a belief in a super-human or divine being is a reasonable exercise of legislative judgment. *George* v. *United States, supra*, 196 F. 2d at 452. Congress was not required to grant special treatment to all persons who entertain political, social, moral or philosophic objections to warfare merely because it granted such treatment to those motivated by traditional religious considerations.

Petitioner's subsidiary contention is that if a conscientious objector is convicted of violating the Act he is then ineligible to hold public office, and that this

constitutes a religious test for the holding of public office which violates Article VI, Clause 3 of the Constitution (Pet. 29). This argument is patently unsound. A person who is "conscientiously opposed to participation in war" may report for the alternative duties required of him by law. If he chooses to violate the law by not reporting at all, ineligibility for public office results from his criminal omission and not from his choice of religion. See *Clark* v. *United States*, 236 F. 2d 13, 23 (C.A. 9), certiorari denied, 352 U.S. 882.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

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